Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

REINHOLD MARSONER,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do principles of international comity preclude a United States court from enforcing an order which compels an Austrian citizen residing in the United States to violate the sovereign laws of Austria?

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OPINIONS BELOW

Petitioner seeks review of the opinion filed on November 7, 1994, by the United States Court of Appeals for the Ninth Circuit, which affirmed a district court order finding petitioner in contempt for refusing to sign a consent directive before the grand jury as directed by the district court. That opinion is reported at 40 F.3d 959, and is reproduced as Appendix A in the separate Appendix to this petition.

STATEMENT OF JURISDICTION

The United States District Court for the District of Arizona exercised jurisdiction in this matter under 28 U.S.C. § 1826 on the government's motion to compel petitioner to sign a consent directive before a federal grand jury. The district court entered a Memorandum Decision and Order on March 31, 1994, directing petitioner to sign the consent directive attached to the Order. (Appendix B.) Upon petitioner's

refusal to sign the consent directive, the district court entered an Order dated May 2, 1994, finding petitioner in civil contempt, and imposing a fine and incarceration until petitioner purged his contempt. (Appendix C.) The district court stayed the fine and sanction of incarceration pending appeal to the Ninth Circuit Court of Appeals and application for writ of certiorari to the United States Supreme Court. (Id.)

Petitioner filed an appeal to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291. On June 3, 1994, the court of appeals entered an order [published opinion to follow] affirming the district court's order. (Appendix F.) The appellate court's opinion for publication was filed on November 7, 1994. (Appendix A.)

Petitioner filed a petition for rehearing, with suggestion for rehearing en

banc. On February 2, 1995, the appellate court entered an order denying rehearing en banc. (Appendix D.) On motion of petitioner, the appellate court stayed the mandate of the court until March 13, 1995. On April 26, 1995, the appellate court recalled its mandate and amended its order of February 2, 1995, *nunc pro tunc*, denying the petition for rehearing and rejecting the suggestion for rehearing en banc. (Appendix E.)

This petition for certiorari was filed on May 2, 1995, within 90 days of the order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing.

This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves provisions of Austrian banking law (Bundesgesetzblatt, No. 63/1979, or the "1979 Banking Statute," § 23), Austria's Law on Extradition and Mutual Assistance in Criminal Matters, and the European Convention on Human Rights. The pertinent provisions of these laws are analyzed in this brief and in the underlying opinion of the United States Court of Appeals for the Ninth Circuit (Appendix at A-14, A-25, A-30, A-31 n.2, A-32 - A-33.

STATEMENT OF THE CASE

In May 1993, the Internal Revenue Service executed search warrants on the residence and business premises of Reinhold Marsoner, an Austrian citizen residing in the United States. Among the items seized were certain documents indicating that Mr. Marsoner had loans with an Austrian bank.

On January 20, 1994, Mr. Marsoner was subpoenaed before a federal grand jury to sign a compelled consent directive authorizing disclosure of the records of any bank account for which he is, was, or may be a relevant principal. (See Appendix at A-2, A-3.) The consent directive specifically authorized disclosure of bank records otherwise protected by the laws of Austria. (See Appendix at B-4.)

Mr. Marsoner appeared before the grand jury and refused to sign the consent directive, asserting his rights under the Fourth and Fifth Amendments to the United States Constitution and his rights under the laws of Austria. (See Appendix at A-3.)

The government filed a motion with the United States District Court to compel Mr. Marsoner to sign the consent directive. (See Appendix at A-3, A-4.) Mr. Marsoner filed a response in opposition, supported by the affidavits of two experts on Austri-

an law attesting to the bank secrecy laws of Austria, and a motion for an evidentiary hearing to consider the implications of Austrian law. (Id.) The court heard oral argument on the government's motion but declined to hold an evidentiary hearing. (See Appendix at A-4.) The district court's order, filed on March 31, 1994, found no violation of Mr. Marsoner's Fourth and Fifth Amendment rights, no need to consider the implications of Austrian law, and directed Mr. Marsoner to sign the consent directive on or before April 8, 1994. (Appendix at B-3.)

Mr. Marsoner appeared on April 11, 1994, and once again refused to sign the consent directive, invoking his rights under the Fourth and Fifth Amendments to the United States Constitution and the sovereign laws of Austria. (Appendix at A-4, A-5.)

The government petitioned for an order to show cause why Mr. Marsoner should not be held in contempt of the district court's order. (Appendix at A-5.) On May 2, 1994, the district court found Mr. Marsoner in civil contempt, imposed a fine of $100 and incarceration during the term of the grand jury or until Mr. Marsoner purged himself of the contempt by signing the consent directive. (Appendix C.) The court stayed the fine and incarceration pending appeal to the Ninth Circuit and application for a writ of certiorari to the United States Supreme Court. (Id. at C-2.)

Mr. Marsoner appealed to the United States Court of Appeals for the Ninth Circuit from the district court's order. Mr. Marsoner's brief raised two issues:

1. Did the district court err in failing to hold an evidentiary hearing to consider

the implications of Austrian law?

2. Can [Mr. Marsoner] be compelled to sign a consent directive waiving his Fourth and Fifth Amendment rights under the United States Constitution and his rights as an Austrian citizen?

Mr. Marsoner asked the court of appeals to remand for an evidentiary hearing on the implications of Austrian law. The government filed an answering brief and Mr. Marsoner filed a reply. On June 3, 1994, the appellate court entered an order, without opinion, which affirmed the district court's order. (Appendix F.) Pursuant to a motion filed by Mr. Marsoner, the court of appeals granted an extension to file a petition for rehearing to 14 days after publication of the court's opinion.

The appellate court's opinion for publication was filed on November 7, 1994. (Appendix A.) In a two-to-one decision, the majority found that Mr. Marsoner's execution of the consent directive is not testimonial and, therefore, does not implicate his Fifth Amendment rights. (Id. at A-8.) The majority found further that, because the documents to be produced under the consent directive have already been prepared, there is no compulsion and no Fifth Amendment implication. (Id. at A-9.)

Addressing Mr. Marsoner's Fourth Amendment claims, the majority found that an **American** depositor has no reasonable expectation of privacy in records maintained by a bank. (Id. at A-11.) The majority noted that the Supreme Court has extended that analysis to the privacy expectations of an individual depositing funds in a foreign bank. (Id. at A-12.) The majority found that the district court

erred by failing to consider the role of Austrian law in its evaluation of Mr. Marsoner's Fourth Amendment claim, but that the court of appeals could review *de novo* the impact of Austrian law on Mr. Marsoner's expectations of privacy. (Id. at A-13, A-14.) The majority found that while the Austrian banking statute generally protects banking secrets, it is not a "blanket guarantee," and that considerations of United States law dilute Mr. Marsoner's expectations of privacy. (Id. at A-15.)

Finally, the court of appeals considered whether the principles of international comity prevented the district court from enforcing its order. (Id. at A-18.) The majority found it unnecessary to evaluate the accuracy of the opinions expressed in the affidavits of the Austrian law experts proffered by Mr. Marsoner; that even if the district court order implicates Mr.

Marsoner's rights under Austrian law, international comity will not preclude its enforcement. (Id. at A-21.) The majority found that the wording of the consent directive left the Austrian courts free to decide whether the directive constitutes valid consent under Austrian law. (Id. at A-27.) The majority found it preferable to allow the Austrian courts to decide what effect to give the consent directive if the district court attempted to enforce its order with respect to Austrian bank records. (Id. at A-28.)

The Honorable Harry Pregerson dissented from the opinion affirming the district court's order. Judge Pregerson found it uncontroverted that a coerced consent would violate Austrian law (id. at A-30), and that since forcing Mr. Marsoner to sign the consent directive appears unlikely to achieve the desired result, on balance, Austria's interest in protecting its citi-

zens and regulating official acts in Austria appears to outweigh the United States' interest in obtaining Mr. Marsoner's signature (id. at A-34). Judge Pregerson found that the consent directive was designed to accomplish what could not otherwise be accomplished in Austria and that compelling Mr. Marsoner to sign the consent might be an affront to Austria, in that the coerced consent was contrary to Austrian law and apparently designed to circumvent Austrian law. (Id. at A-34, A-35.) Judge Pregerson concluded that notions of international comity preclude enforcement of the district court's coercive order. (Id. at A-36.)

Mr. Marsoner filed a petition for rehearing, with suggestion for rehearing en banc, on the grounds that compelling Mr. Marsoner to sign the consent directive under threat of incarceration and imposition of a fine violated Austrian law; incarcerating Mr. Marsoner for refusing to

sign the consent directive would violate the European Convention on Human Rights, which is constitutional law in Austria; and enforcing the district court's order would be an affront to Austria. The appellate court's *non pro tunc* order denying rehearing and rejecting a suggestion for rehearing en banc is dated February 2, 1995. (Appendix E.)

The mandate of the appellate court has been stayed until May 10, 1995. (Id.)

SUMMARY OF ARGUMENT

The uncontroverted testimony of experts on Austrian law established that compelling Mr. Marsoner to sign a consent directive authorizing disclosure of Austrian bank accounts and production of all documents in the possession of such banks under threat of incarceration and imposition of a fine would violate Austrian law and Mr. Marsoner's rights as an Austrian citizen under the European Convention on

Human Rights, which is constitutional law in Austria. It would be an affront to Austria for a United States Court to compel Mr. Marsoner to sign the consent directive, and thus sanction an attempt to circumvent the laws of Austria.

International law and principles of international comity preclude enforcement of the district court's coercive order.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT INTERNATIONAL LAW AND PRINCIPLES OF INTERNATIONAL COMITY DO NOT PRECLUDE ENFORCEMENT OF THE DISTRICT COURT'S ORDER.

This case presents the two-fold question of whether a United States court may compel an Austrian citizen to violate the laws of Austria, and more importantly, whether a United States court should sanction an attempt to circumvent the laws of Austria. Petitioner submits that the Ninth Circuit Court of Appeals erred by focusing only on the legality, under the laws of the

United States, of compelling an Austrian citizen residing in the United States to sign a consent to the disclosure of Austrian bank records. (See Appendix A at A-18.)

Although the act of compelling Mr. Marsoner's signature would take place wholly within the United States, it is designed to accomplish what could not otherwise be accomplished in Austria. The uncontroverted affidavits of Marsoner's experts on Austrian law established the following facts:

1. The absolute right of an Austrian national to financial privacy has a long history and is basic to the Austrian economic, legal and democratic system.

2. Austria has the tightest banking secrecy laws in the world. Austrian government policy makes it a priority to maintain bank secrecy and confidentiality. Austria has a vested economic interest in

maintaining the strictest bank secrecy laws possible.

3. Austrian bank secrecy is protected by statute and, in fact, has the character of constitutional law.

4. The duty to protect the bank client's secrecy extends to all who perform work for the bank on any basis, and all officials and agencies who are privy to such information.

5. Violations of banking secrecy are a criminal offense under Austrian law. Separate civil damage and injunction suits may also be filed.

6. Exceptions to banking secrecy are few, carefully circumscribed and rarely invoked. Exceptions are made for civil matters involving the probate of an estate, cases where a depositor is under the control of a guardian, providing general information about the financial position of an enterprise (unless the enterprise has

expressly forbidden giving such information), disclosures necessary to clear legal issues between the depositor and the bank, a reporting duty under the Inheritance and Gift Tax Act, disclosures to foreign authorities where international agreements so provide, and employee dismissal matters.

7. An exception to banking secrecy is made for criminal proceedings, but only for criminal proceedings commenced before Austrian courts, and only after significant, detailed procedural hurdles have been overcome. There is no exception for investigations of any kind, domestic or foreign.

8. Compelling an Austrian citizen to consent to a waiver of banking secrecy violates basic principles of Austrian and international law.

9. Austria's Law on Extradition and Mutual Assistance in Criminal Matters (the "ARHG") prohibits foreign authorities from conducting investigations or procedural

acts on Austrian territory. The only means by which foreign prosecutors may obtain Austrian bank records is to apply through or comply with the ARHG or an applicable treaty. Because there currently is no applicable treaty between the United States and Austria, the ARHG governs.

10. In general, Austrian banking laws require the **voluntary** written consent of the depositor before any information will be disclosed by an Austrian bank. A coerced consent to disclosure of Austrian banking information would violate Austrian law.

In the face of these uncontroverted facts, the court of appeals found it unnecessary to determine whether compelling Mr. Marsoner to sign the consent directive would violate Austrian law. (Appendix A at A-21.) The court totally disregarded the issue of whether the district court's order violates Austrian law. Instead, the court

engaged in the fiction that because the district court's order itself does not compel any bank, official, employee, or any other third person to produce bank records (id. at A-27), Mr. Marsoner may be compelled under threat of incarceration to violate the sovereign laws of Austria. The court of appeals erroneously found that the consent directive authorized and directed "unspecified banks" to disclose information and produce documents. (Id.) The obvious and only purpose of the consent directive is to obtain disclosure of information concerning Mr. Marsoner's Austrian bank accounts, information which the government, based upon its investigation, believes to exist. This fact distinguishes the consent directive presented to Mr. Marsoner from the directive at issue in Doe v. United

States, 487 U.S. 201, 207 (1988).[1] Moreover, this Court has already established that an American depositor has no reasonable expectation of privacy in bank records. United States v. Miller, 425 U.S. 435, 442 (1976); United States v. Payner, 447 U.S. 727, 732 n.4 (1980). As the testimony of Mr. Marsoner's Austrian law experts established, the protections guaranteed with respect to the Austrian bank accounts of Austrian citizens are quite a different matter. It is necessary to obtain Mr. Marsoner's written consent to disclosure of Austrian bank records.

The court of appeals had evidence that Austria's Law on Extradition and Mutual Assistance in Criminal Matters (hereinafter the "ARHG") prohibits foreign authorities

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[1] In Doe the court was not called upon to address the international comity questions implicated by the government's attempt to overcome protections afforded by the laws of another nation. Id. at 218-19 n.16.

from conducting investigations or procedural acts on Austrian territory. (See Appendix A at A-32.) The only way foreign prosecutors may obtain Austrian bank records is to apply through the ARHG or an applicable treaty. (Id.) There currently is no applicable treaty between the United States and Austria; therefore, the ARHG governs. (Id.) No legal assistance from Austria is possible under the ARHG if the claimed violation of foreign law involves taxes or customs law. (Id. at A-33.) As Judge Pregerson observed in his dissenting opinion, "[c]ommon sense supports the view that Austrian courts are unlikely to enforce the consent. To do so would be akin to endorsing a violation of the ARHG." (Id. at A-34.)

Moreover, incarcerating Mr. Marsoner as punishment for refusing to sign the consent directive authorizing release of Austrian bank records violates the European

Convention on Human Rights ("ECHR"), which is considered constitutional law in Austria. (Id. at A-30.) Austria prohibits the use of coercion or threats to obtain evidence. (Id.) Accordingly, an Austrian court is likely to interpret Mr. Marsoner's compelled consent as violating the ECHR. (Id.)

In the circumstances of this case it was error for the court of appeals to leave the determination of the effectiveness of Mr. Marsoner's compelled consent to the Austrian courts, and, in effect, sanction an attempt to circumvent the laws of Austria. The court's reliance on In re Grand Jury Proceedings (Yanagihara), 709 F. Supp. 192 (C.D. Cal. 1989), when discussing its preference that Austrian courts determine the validity of the consent is misplaced. The appellant in Yanagihara failed to show that compelling his consent was inconsistent with Swiss law. Id. at 196. The

uncontroverted testimony presented in this case establishes that compelling Mr. Marsoner's consent is inconsistent with Austrian law. See United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 343-344 (7th Cir. 1983) (expert testimony in the form of affidavits, letters and translations accepted as evidence of Greek law relative to bank secrecy).[2] Moreover, the uncontroverted testimony in this case establishes that the only means by which a United States prosecutor could obtain Austrian bank records is to apply through the ARHG, and in this case, it would be a violation of the ARHG to provide the bank records.

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[2] In First Nat'l Bank of Chicago, the Seventh Circuit declined to enforce an Internal Revenue Service summons which would compel violation of Greek bank secrecy laws. This decision raises a possible issue of conflict between the Seventh and Ninth Circuits.

It is submitted that under the Restatement (Third) of Foreign Relations Law § 403 (1987)[3], reasonableness is "an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe." The importance of bank secrecy to Austria, the extent to which bank secrecy is consistent with the traditions of Austrian law, and the existence of justified expectations of Austrian citizens that their bank records will be protected all support the reasonableness of finding that international comity precludes enforcement of the district court's coercive order. Moreover, it would be an affront to Austria for a United States court to compel an action in an attempt to circumvent the laws of Austria.

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[3] Section 403 of the Restatement (Third) is cited in its entirety at A-23 to A-24 of the Appendix to this Petition, and in the interests of brevity is not repeated here.

See In re Sealed Case, 825 F.2d 494, 498-99 (D.C. Cir.), cert. denied, 484 U.S. 963 (1987) (it might be an affront to the United States for a "foreign court . . . to compel someone to violate our laws within our borders").

The dissenting opinion of Judge Pregerson correctly analyzes the issues which the majority opinion failed to address, or dismissed as irrelevant. On balance, Austria's interest in protecting its citizens and regulating official acts in Austria outweighs the United States' interest in obtaining Mr. Marsoner's signature on the consent directive. Accordingly, principles of international comity preclude enforcement of the district court's coercive order.

CONCLUSION

For all of the above reasons, petitioner respectfully requests this Court to grant this certiorari petition to address

the important issue of international law presented here and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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UNITED STATES OF AMERICA,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[Filed November 7, 1994]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	)	No. 94-15781
	)	
REINHOLD MARSONER,	)	D.C. No. MISC-1-00093-SMM
	)	
Witness-Appellant,	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	OPINION
	)	
Appellee.	)	
	)	

Appeal from United States District Court
for the District of Arizona
Stephen M. McNamee,
District Judge, Presiding

Submitted June 1, 1994
Order Filed: June 3, 1994
Opinion Filed: November 7, 1994

Before: TANG, PREGERSON, and T.G. NELSON, Circuit Judges.

PER CURIAM:

I.
Overview

Reinhold Marsoner appeals the district court's order finding him in contempt for refusing to sign a consent directive as

ordered by the district court. The appeal was expedited pursuant to 28 U.S.C. § 1826(b). On June 3, 1994, we entered an order affirming the district court order, with Judge Pregerson indicating his dissent. Our order stated that opinions would follow. We now deliver them.

II.
Facts and Procedural History

Marsoner, an Austrian citizen residing in the United States, is the target of an investigation by a federal grand jury, which is investigating possible violations of United States laws stemming from claimed tax liabilities for the years 1989 through 1991. Marsoner was subpoenaed to appear before the grand jury to sign a disclosure directive. The disclosure directive states that Marsoner authorizes and directs any bank at which Marsoner had a bank or loan account for which Marsoner was, is, or may be the relevant principal, signatory, or

beneficiary to disclose all information and produce all documents in its possession to the grand jury or to an attorney or agent of the United States Attorney. The directive also authorizes any bank employee, officer, or agent of such bank to provide testimony or evidence in connection with any proceeding arising out of the disclosure of the bank information or documents. The directive states that it has been executed pursuant to a United States district court order and that it is intended to be construed as consent to disclosure under Austrian law for any bank account for which Marsoner is the relevant principal.

Marsoner appeared before the grand jury and refused to sign the disclosure directive, claiming it violated his rights under the Fourth and Fifth Amendments of the United States Constitution and under the laws of Austria. The government filed a motion to compel Marsoner to sign the

disclosure directive, which the district court granted on January 31, 1994. Marsoner requested reconsideration, filed a response in opposition to the government's motion to compel, and filed a motion for an evidentiary hearing on the implications of Austrian law. In support, Marsoner furnished affidavits of two individuals he represented as authorities on Austrian law. The government filed a reply and a supplemental reply.

The district court held a hearing on the motion to compel. The district court granted the government's motion to compel and denied Marsoner's request for an evidentiary hearing as unnecessary. The district court ordered Marsoner to sign the disclosure directive by April 8, 1994.

On April 11, 1994, Marsoner appeared before the grand jury and refused to sign the directive, again on the grounds that it violated his rights under the Fourth and

Fifth Amendments and under the laws of Austria. On April 12, 1994, the government filed a petition for an order to show cause why Marsoner should not be held in contempt for refusing to sign the disclosure directive. Following a hearing, the district court held Marsoner in civil contempt under 28 U.S.C. § 1826(a). The district court imposed a $100.00 fine and order Marsoner confined until either he purged his contempt or the grand jury's term expired. This appeal follows.

III.
Standard of Review

We review the district court's finding of contempt under 28 U.S.C. § 1826 for an abuse of discretion. In re Grand Jury Proceedings (Doe), 801 F.2d 1164, 1167 (9th Cir. 1986) (per curiam).

IV.
Discussion

A. Fifth Amendment Claim

Marsoner contends that the district court order compelling him to sign the disclosure directive violates his rights under the Fifth Amendment. We disagree.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S.C.A. Const. Amend. 5. This protection applies only when the testimony furnished would incriminate the witness. See Doe v. United States, 487 U.S. 201, 207 (1988) (citing Fisher v. United States, 425 U.S. 391, 409 (1976). The protection also applies only to a communication that is of a "testimonial or communicative nature." Id. at 210 (citing Schmerber v. California, 384 U.S. 757, 761 (1966)).

In Doe, the Supreme Court determined that a consent directive similar to the one

the district court ordered Marsoner to sign was not testimonial and, therefore, that the district court order compelling the petitioner to sign the consent directive did not violate the petitioner's Fifth Amendment rights. 487 U.S. at 219. The Supreme Court noted that the consent directive did not refer to a specific account, identify the relevant bank, or require the petitioner to acknowledge the existence of a foreign bank account or to admit the authenticity of any documents. Id. at 215-16. The Court further noted that the consent directive did not shed light on the petitioner's state of mind with respect to the issue of petitioner's consent. Id. at 216. The Court found that execution of the consent directive was analogous to providing a handwriting sample or voice exemplar, neither of which is a testimonial act. Id. at 217. The Court observed that when the consent directive is forwarded to the

relevant banks, the only factual statement that will be made will be the bank's "implicit declaration, by its act of production in response to the subpoena, that it believes the accounts to be petitioner's." Id. at 218 (emphasis in original). See also In re Grand Jury Proceedings (United States v. Cid-Molina), 767 F.2d 1131, 1132 (5th Cir. 1985).

The disclosure directive presented to Marsoner, like the one examined in Doe, does not identify any specific accounts, identify any relevant banks, attest to the authenticity of any documents, or acknowledge the existence of any bank accounts. It does not imply that Marsoner has consented to the execution of the directive, shed light on Marsoner's state of mind, or involve any assertion of fact. Accordingly, we find that Marsoner's execution of the disclosure directive is not testimonial and, therefore, does not implicate his

rights under the Fifth Amendment. See Doe, 487 U.S. at 219.

Moreover, where a bank voluntarily prepares records, production of the records does not involved "compelled" testimonial evidence because there is no compulsion. Fisher, 425 U.S. at 409-10. Because the disclosure directive instructs banks to produce documents that have already been prepared, there is no compulsion and no Fifth Amendment implication. See id.

Marsoner's attempt to distinguish Doe is unsuccessful, and his reliance on Hoffman is misplaced. The disclosure directive's incriminating feature is but one of the two requirements for a successful claim under the Fifth Amendment. See Doe, 487 U.S. at 207. In order to constitute a violation under the Fifth Amendment, the compelled communication must be testimonial or communicative. See id. Because Marsoner's signature on the disclosure

directive is not testimonial or communicative, its potentially incriminating repercussions are of no consequence. See id. See also In re Grand Jury Proceedings (Cid-Molina, 767 F.2d at 1132 & n.1 (rejecting a Fifth Amendment challenge to a district court order compelling an individual to comply with a grand jury subpoena by executing a consent directive that specifically identified two banks which were to disclosure information). Cf. Hoffman, 341 U.S. at 486.

B. Fourth Amendment Claim

Marsoner next contends that the district court order compelling him to sign the consent directive violates his expectations of privacy under the Fourth Amendment. We disagree.

We review de novo the district court's decision that a witness does not have a protected Fourth Amendment interest in his

foreign bank accounts. See United States v. Mann, 829 F.2d 849, 851 (9th Cir. 1987).

The Fourth Amendment protects against intrusions into an individual's "zone of privacy." United States v. Miller, 425 U.S. 435, 400 (1976) (citing Hoffa v. United States, 385 U.S. 293, 301-02 (1966). In general, an American depositor has no reasonable expectation of privacy in copies of his or her bank records, such as checks, deposit slips, and financial statements maintained by the bank. Id. at 442. A "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." Id. at 443. Where an individual's Fourth Amendment rights are not implicated, obtaining the documents does not violate his or her rights, even if the documents lead to indictment. See id. at 445.

The Supreme Court has extended this analysis to the privacy expectations of an individual depositing funds in a foreign bank. In United States v. Payner, 447 U.S. 727, 732 n.4 (1980), the Court rejected the claim that the Bahamian law of bank secrecy created an expectation of privacy. The Court found that the applicable foreign law of bank secrecy "is hardly a blanket guarantee of privacy. Its application is limited; it is hedged with exceptions; and we have been directed to no authority construing its terms. Moreover, American depositors know that their own country requires them to report relationships with foreign financial institutions." Id. On that ground, the Court concluded the respondent had no expectation of privacy in Bahamian bank records that document his account. Id.

We reached a similar conclusion in Mann, where we rejected a depositor's claim

that Cayman law's restrictions on disclosure of information concerning Cayman bank records created a reasonable expectation of privacy protected by the Fourth Amendment. 829 F.2d at 851-52. We found that Cayman law contained a general privilege against disclosure of bank records but contained a "vast array of exceptions." Id. at 852. We found Cayman law analogous to the Bahamian law reviewed in Payner and ruled there was no Fourth Amendment violation. Id.[1]

Marsoner correctly asserts that the district court erred by failing to consider the role of Austrian law in its evaluation of Marsoner's Fourth Amendment claim. See id. at 851-52. Nevertheless, because we conduct a de novo review, we may consider

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[1] We observed that, generally, foreign laws governing privacy of bank matters do not create an expectation of privacy beyond that discussed in Miller. Mann, 829 F.2d at 852.

the impact of Austrian law on Marsoner's expectations of privacy.

Austrian law provides that, generally, banks, and bank officers, employees and personnel may not disclose or use confidential information obtained on the basis of the bank's relationship with a client. Bundesgesetzblatt, No. 63/1979 (hereinafter "1979 Banking Statute" or "banking statute") § 23(1). There is no obligation to maintain confidentiality in several situations, including cases in which the client provides express written consent to disclosure of the banking secret, in connection with inheritance proceedings or criminal court proceedings in Austrian courts, or cases involving general information about the economic circumstances of an entrepreneur. Id. at § 23(2). Under the banking statute, individuals disclosing or using bank secrets protected under section 23 may be punished only if they disclose or use

the secrets to obtain financial advantage for either themselves or others or to cause detriment to another. Id. at § 34(1). Thus, although the statute generally protects banking secrets, it is not a "blanket guarantee."

We find considerations of United States law dilute Marsoner's expectation of privacy. United States citizens and residents are required to reveal the existence of foreign bank accounts and to report transactions made with a foreign financial agency. 31 U.S.C. § 5314(a). This information is to be reported to the Commissioner of Internal Revenue for each year in which such relationship or transactions occur. 31 C.F.R. § 103.24 (1984). Thus, Marsoner, as a resident, had an expectation that any transactions with Austrian banks would have to be disclosed. See Payner, 447 U.S. at 732 n.4.

Marsoner distinguishes his case from Payner and Mann on the grounds that he is an Austrian citizen asserting his rights under Austrian law. He points out that Payner and Mann, which rejected Fourth Amendment challenges to orders directing disclosure of foreign bank records, involved United States citizens asserting privacy interests under foreign law. We find this distinction inapposite. First, neither our reading of the section 23 of the 1979 Banking Statute nor the affidavits furnished by Marsoner suggest that the bank's duty under section 23 to maintain confidentiality applies only to accounts maintained by Austrian citizens. Second, and more importantly, the United States law requiring disclosure of foreign accounts applies to United States citizens and residents alike. See 31 U.S.C. § 5314. Thus, because he is a United States resident, Marsoner's status as an Austrian citizen

does not relieve him of the obligation to report transactions with foreign financial agencies. Because we find that Marsoner's expectation of privacy in his Austrian bank records is diluted, we conclude that the district court order does not violate Marsoner's Fourth Amendment rights.

C. International Comity

Marsoner's final contention is that the district court's order violates his rights under Austrian law. He argues that the district court erred by failing to conduct an evidentiary hearing on the implications of Austrian law and asks us to remand for an evidentiary hearing. The government counters that remand and an evidentiary hearing are unnecessary because this court is in a position to analyze the implications of Austrian law. We find the government's position more persuasive.

The issue before us is not solely whether the district court order compelling

Marsoner to sign the disclosure directive before the grand jury violates Austrian law. Rather the issue is whether, if the district court's order violates Austrian law, principles of international comity prevent the district court from enforcing its order.[2]

A party relying on foreign law to contend that a district court's order violates principles of international comity bears the burden of demonstrating that the foreign law bars compliance with the order. In re Grand Jury Proceedings (Shams), 873 F.2d 238, 239-40 (9th Cir. 1989) (citing

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[2] We note that this case does not involve Austrian bank officials or employees found in contempt for resisting a request or order for production of bank records. Cf. In re Sealed Case, 825 F.2d 494, 498 (D.C. Cir.), cert. denied, 484 U.S. 963 (1987). Accordingly, we focus only on the legality of compelling an Austrian citizen, residing in the United States, to sign a consent to the disclosure of bank records, which may or may not include records maintained in connection with Austrian bank accounts.

United States v. Vetco, Inc., 691 F.2d 1281, 1289 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). If the party fails to produce evidence in support, then he fails to meet his burden on the comity issue, and the district court need not consider it. Id. at 240.

Marsoner proffered to the district court lengthy affidavits from two individuals with strong credentials in the area of international law and Austrian banking law, who presented their analysis of relevant Austrian law. Thus, we find, at a minimum, Marsoner met his burden of producing evidence sufficient for the court to consider the implications of Austrian law. See id. at 239-40. Accordingly, the district court erred by failing to consider the implications of Austrian law.

Nevertheless, a determination of foreign law is a ruling on a question of law, which an appellate court is free to

determine based on its own analysis. See United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 344 (7th Cir. 1983). We find that the record is sufficiently developed and that remand is unnecessary to a determination of whether the order compelling Marsoner to sign the disclosure directive violated Marsoner's rights under Austrian law and whether considerations of international comity prevent its enforcement. See id.

Under the Federal Rules of Civil Procedure, "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1. "An expert witness [testifying about foreign law] is not required to meet any special qualifica-

tions. Indeed he need not even be admitted to practice in the country whose law is in issue." 9 C. Wright & A. Miller, Federal Practice & Procedure § 2444 at 406 (1971).

In the affidavits proffered by Marsoner, both affiants opine that compelling Marsoner to sign the consent directive would violate Austrian law. We need not evaluate the accuracy of these opinions. We find that even if the district court order compelling Marsoner to sign the disclosure directive implicates Marsoner's rights under Austrian law, international comity will not preclude its enforcement.

We acknowledge that "in recent years litigants have often attempted to circumvent [the limitations of international comity] by seeking an order compelling the record-owner to consent to the disclosure of the records." United States v. Davis, 767 F.2d 1025, 1034 (2d Cir. 1985). In considering international comity, we bal-

ance the competing interests of Austria and the United States and the extent to which they are affected by the order compelling Marsoner's signature to determine whether the purported illegality of the order under Austrian law precludes its enforcement. See id. at 1034-35; Vetco, 691 F.2d at 1288. We decide this based on the particulars involved. Vetco, 691 F.2d at 1288.

In the past, courts have used section 40 of the Restatement (Second) of Foreign Relations Law (1965) to evaluate whether international comity precludes enforcement of an order compelling a witness to sign a consent authorizing disclosure of foreign bank records. See, e.g., Davis, 767 F.2d 1025; Vetco, 691 F.2d 1281. Section 40 of the Restatement has been revised and is now encompassed within section 403 of the

Restatement (Third).[3] Under the revised

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[3] Section 403 of Restatement (Third) provides:

> Limitations on Jurisdiction to Prescribe
>
> (1) . . . a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
>
> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state . . . ;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, . . . ;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal or economic system;
>
> (f) the extent to which the regulation is consistent with the tradi-

(continued...)

Restatement, reasonableness is "an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe." Restatement (Third) of Foreign Relations Law § 403 reporter's note 10 (1987).

Applying these factors to the situation presented here, we hold that international comity does not preclude enforcement of the district court's order. Marsoner is

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[3](...continued)
tions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Restatement (3d) of Foreign Relations Law § 403 (1987).

suspected of using his Austrian bank accounts to evade taxes in the United States. The grand jury seeks Austrian bank information in an effort to link Marsoner to alleged illegal activities that occurred in the United States between 1989 and 1991. Although Marsoner is an Austrian citizen, he [is] a United States resident and his economic activity, which includes tax liabilities, involves the United States.

The United States has a strong interest in collecting taxes, see Vetco, 691 F.2d at 1289, and in prosecuting individuals for tax evasion, see Davis, 767 F.2d at 1035. Additionally, while Austria has enacted a statute to maintain the secrecy of bank records, it has created exceptions to the secrecy provisions. See 1979 Banking Statute § 23(2).

Although under the 1979 Banking Statute, Marsoner may have expected that his Austrian bank records would remain confi-

dential, the statute does not provide a blanket guarantee. Moreover, under the United States' laws, Marsoner should have expected that he would be required to disclose transactions with foreign banking institutions to the Commissioner of Internal Revenue. The grand jury's investigative function, which here involves investigating possible violations of tax laws, plays a vital role in our system of jurisprudence. See In re Grand Jury Proceedings (United States v. Bank of Nova Scotia), 691 F.2d 1384, 1387 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

Austria has a prohibition against compelling an individual from being a witness against himself, which is similar to that embraced by the Fifth Amendment. As we previously discussed, the district court's order directing Marsoner to appear before the grand jury to sign the disclos-

ure directive does not violate his Fifth Amendment rights.

Although more significant interests may be implicated in the next stage of the grand jury investigation, e.g., if the district court attempts to compel an Austrian bank to produce documents based on Marsoner's signed consent, those interests are beyond the scope of this appeal.[4] The disclosure directive is worded to indicate that it has been executed pursuant to an order of a United States court. Accordingly, the Austrian courts will be free to decide whether the directive constitutes valid consent under Austrian law. See In re Grand Jury Proceedings (Yanagihara), 709 F. Supp. 192, 196 (C.D. Cal. 1989) (noting

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[4] We reiterate the limited scope of the district court's order; it compels Marsoner to execute the disclosure directive authorizing and directing unspecified banks to disclose information and produce documents. The order does not compel any bank, official, employee, or any other third person to produce any bank records.

that consent was "framed so as to permit the foreign authorities to render their own judgment on its validity"). We find it preferable to allow the Austrian courts to decide what effect to give the disclosure directive with respect to Austrian bank records.

On balance, we find that the United States' interest in obtaining Marsoner's signature outweighs Austria's interest in preventing a United States court from compelling an Austrian citizen residing in the United States to appear before a grand jury to execute a disclosure directive authorizing disclosure of bank information from unidentified domestic or foreign banks.

V.
Conclusion

Marsoner's challenges to the district court's order compelling him to sign the directive do not constitute just cause for

his refusal to do so. See 28 U.S.C. § 1826(a). Accordingly, the district court did not abuse its discretion by holding Marsoner in contempt. See In re Grand Jury Proceedings (Doe), 801 F.2d at 1167.

AFFIRMED.

PREGERSON, dissenting:

I dissent from the decision affirming the district court's order finding Reinhold Marsoner in contempt of court.

The district court ordered Marsoner to sign the disclosure directive authorizing disclosure of information and production of all documents in possession of a bank, including Austrian banks, under threat that noncompliance would result in his incarceration and imposition of a fine. Marsoner refused to sign, and the district court ordered Marsoner incarcerated until he signs the disclosure directive or until the term of the grand jury expires in October 1994.

It is uncontroverted that coerced consent would violate Austrian law. The experts on Austrian law, Bruce Zagaris and Wulf G. Hauser, both expressed the opinion that incarcerating an individual as punishment for refusing to sign a disclosure directive authorizing release of Austrian bank records violates the European Convention on Human Rights ("ECHR"), which is considered constitutional law in Austria. Zagaris decl. ¶ 80; Hauser decl. ¶¶ 41-42.[1] Austria prohibits the use of coercion or threats to obtain a confession or other evidence. Hauser decl. ¶ 42. According to Zagaris and Hauser, an Austrian court is likely to interpret Marsoner's compelled consent as violating Articles 3, 6, and 8

[1] Reference is to the affidavits of experts submitted by Marsoner to the district court.

of the ECHR.[2] Zagaris decl. ¶ 80; Hauser decl. ¶¶ 41-42.

Because the district court's order is coercive and probably violates Austrian law, we should balance the "competing" interests of the two nations to determine whether notions of international comity preclude enforcement of the coercive order. See United States v. Vetco, Inc., 691 F.2d 1281, 1288 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). Under the Restatement (Third) of Foreign Relations § 403(2)(h), we consider the likelihood that the district court's exercise of jurisdiction conflicts with regulation by Austria. We

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[2] Article 3 states, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 6 states, that everyone charged with a criminal offense "is entitled to a fair . . . hearing" and has the right "to examine or have examined witnesses against him . . . ." Article 8 states, "everyone has a right to respect for his private and family life . . . . there shall be no interference by a public authority with the exercise of this right."

are obligated to evaluate each state's competing interests in exercising jurisdiction, and we "should defer to the other state if that state's interest is clearly greater." Id. at § 403(3).

Austria's Law on Extradition and Mutual Assistance in Criminal Matters prohibits foreign authorities from conducting investigations or procedural acts on Austrian territory. Bundesgesetz vom 4. Dezember 1979, uber die Auslieferung und die Rechtshilfe in Strafsachen (Auslieferungs und Rechtshilfegesetz), Bundesgesetzblatt No. 529/1979 (hereinafter "ARHG") § 59. See also Zagaris decl. ¶ 75; Hauser decl. ¶ 50. According to Zagaris, the only means by which foreign prosecutors may obtain Austrian bank records is to apply through or comply with the ARHG or an applicable treaty. Zagaris decl. ¶¶ 75, 83. Because there currently is no applicable treaty between the United States and

Austria, the ARHG governs in this case. Hauser decl. ¶ 48.

"[N]o legal assistance [from Austria] is possible under the ARHG if the claimed violation of the foreign law consists of a violation of tax or customs law." Hauser decl. ¶ 49 (citing ARHG § 15). Accordingly, legal assistance is "impossible in the present case." Hauser ¶ 48. Zagaris expressed the opinion that the compelled consent violates the ARHG. Zagaris decl. ¶ 82.

Both experts expressed the opinion that "[a] compelled consent is essentially an effort to circumvent the prohibition against official acts in Austria." Zagaris decl. ¶ 75. See Hauser decl. ¶ 50. See also United States v. Davis, 767 F.2d 1025, 1034 (2d Cir. 1985) ("[I]n recent years litigants have often attempted to circumvent [the limitations of international comity] by seeking an order compelling the

record-owner to consent to the disclosure of the record"). According to the undisputed testimony of both experts, an Austrian court is likely to rule the consent unenforceable.[3] Zagaris ¶ 82. Thus, forcing Marsoner's signature appears unlikely to achieve the intended result. Therefore, on balance, Austria's interest in protecting its citizens and regulating official acts in Austria appears to outweigh the United States' interest in obtaining Marsoner's signature.

Although the act of compelling Marsoner's signature takes place wholly within the United States, it is designed to accomplish what could not otherwise be accomplished in Austria through the ARHG: it is an attempt to obtain Austrian bank records otherwise inaccessible to the

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[3] Common sense supports the view that Austrian courts are unlikely to enforce the consent. To do so would be akin to endorsing a violation of the ARHG.

United States through the ARHG. It might be an affront to the United States for "a foreign court . . . to compel someone to violate our laws within our borders." In re Sealed Case, 825 F.2d 494, 498-99 (D.C. Cir.), cert. denied, 484 U.S. 963 (1987). Likewise, it might also be an affront for a United States court to compel an action, which is performed in the United States but has ramifications in a foreign country, in an attempt to circumvent the laws of that foreign country.

The majority cites In re Grand Jury Proceedings (Yanagihara), 709 F. Supp. 192 (C.D. Cal. 1989), when discussing its preference that Austrian courts determine the validity of Marsoner's compelled consent. That case is distinguishable on the grounds that the appellant had failed to show that compelling his consent was inconsistent with Swiss law. Id. at 196. By contrast, here, the uncontroverted testimo-

ny presented indicates that compelling Marsoner's consent is inconsistent with Austrian law. I would conclude that notions of international comity preclude enforcement of the district court's coercive order.

[Filed March 31, 1994]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE:	)	No. GJ 1-93
	)	
GRAND JURY 1-93	)	MEMORANDUM OF
	)	DECISION AND
	)	ORDER
	)	[UNDER SEAL]
_____	)	

Reinhold Marsoner was subpoenaed before a federal Grand Jury to sign "a directive authorizing any and all banks to disclose all records in his name and all records for any entities as to which he was a relevant principal, signatory or beneficiary." Mr. Marsoner appeared before the Grand Jury and refused to sign the directive, invoking privileges under the Fourth and Fifth Amendments to the Constitution. The Court was presented an order supported by a memorandum to compel Mr. Marsoner to sign the consent directive. The Court signed the order. Thereafter, Mr. Marsoner petitioned the Court to vacate the order

and to further brief the issue; the Court granted Mr. Marsoner's request. Mr. Marsoner, in his memorandum, has reasserted his objections based on the Fourth and Fifth Amendments as well as argued that signing the consent directive would incriminate Mr. Marsoner under Austrian law. The government has filed opposing memoranda, and oral argument has been held.

The procedure used by the government in securing the authorization to disclose the bank records is not violating Mr. Marsoner's Fifth Amendment privilege against self-incrimination. Doe v. United States, 487 U.S. 201 (1988). Further, Mr. Marsoner's Fourth Amendment rights are not violated under a consent directive. United States v. Payner, 447 U.S. 727 (1980); United States v. Mann, 829 F.2d 849 (9th Cir. 1987); United States v. Davis, 767 F.2d 1025 (2nd Cir. 1985); and United

States v. Sturman, 951 F.2d 1466 (6th Cir. 1991).

Having found no violation of Fourth and Fifth Amendment rights, the Court deems that there is no need for an evidentiary hearing regarding implications under Austrian law.

IT IS ORDERED that Reinhold Marsoner appear at the Internal Revenue Service Building, 210 E. Earll Drive, Phoenix, Arizona, on or before Friday, April 8, 1994 at 12:00 p.m. and sign the attached Consent Directive.

DATED this 31 day of March 1994.

/s/Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record.

CONSENT DIRECTIVE

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, REINHOLD MARSONER, hereby authorize and direct any bank at which I may have or may have had a bank account of any kind, in my name or any other name, for which account I am, was, or may be a relevant principal, signatory or beneficiary to disclose all information and deliver copies of all documents of every nature in its possession to Grand Jury 93-1, empaneled October 29, 1993, in the District of Arizona, or to any attorney or agent of the United States Attorney's Office for the District of Arizona assisting said Grand Jury, and this shall be irrevocable authority for so doing. I further irrevocably authorize any employee, officer, or agent of any such bank to give testimony or evidence without limitation in connection with any proceedings arising out of or

relating to this authority and the documents disclosed pursuant thereto.

This direction has been executed pursuant to an Order of the United States Court for the District of Arizona issued in connection with an investigation being conducted by the aforesaid Grand Jury.

This direction is intended to be construed as a consent to disclosure under the Law of Austria with respect to any of the bank accounts for which I may be a relevant principal.

_____

REINHOLD MARSONER

Subscribed to and sworn to before me this _____ day of _____, 1994.

_____

Notary Public

My Commission Expires:

_____

[Filed May 3, 1994]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE:	)	GRAND JURY MISC.
	)	NO. 1-93
GRAND JURY	)	
INVESTIGATION	)	ORDER
_____	)	

Upon petition of the United States Attorney's Office and after hearing the court finds as follows:

1. On March 31, 1994, the court ordered Mr. Reinhold Marsoner to appear at the Internal Revenue Service on or before April 8, 1994 at 12:00 p.m. to sign the attached consent directive;

2. Mr. Marsoner failed without just cause to abide by the court's order and refused to sign the consent directive, asserting his rights under the Fourth and Fifth Amendments of the United States Constitution and the laws of Austria of which he is a citizen;

3. Mr. Reinhold Marsoner is in civil contempt of this court's order of March 31, 1994.

WHEREFORE, the court imposes a sanction in the form of a fine in the amount of $100 and incarceration until Mr. Marsoner purges his contempt by signing the consent directive. Such incarceration is not to exceed the term of the grand jury before which Mr. Marsoner was subpoenaed and ordered to sign the consent directive.

IT IS FURTHER ORDERED staying the fine and sanction of incarceration pending appeal to the Ninth Circuit Court of Appeals and application for writ of certiorari to the United States Supreme Court. Counsel for Mr. Reinhold Marsoner are to inform this court promptly upon resolution of the appeal and application for writ of certiorari.

DATED this 2 day of May, 1994.

/s/ Stephen M. McNamee
United States District Judge
District of Arizona

APPENDIX D

[Filed February 2, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	)	No. 94-15781
	)	
REINHOLD MARSONER,	)	DC# MISC-93-SMM
	)	Arizona
Witness-Appellant,	)	(Phoenix)
v.	)	
	)	
UNITED STATES OF AMERICA,	)	ORDER
	)	
Appellee.	)	

Before: TANG, PREGERSON and T.G. NELSON, Circuit Judges

The panel has voted to deny appellant's petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

APPENDIX E

[Filed April 26, 1995]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	)	No. 94-15781
	)	
REINHOLD MARSONER,	)	DC# MISC-93-SMM Arizona (Phoenix)
Witness-Appellant,	)	
v.	)	
UNITED STATES OF AMERICA,	)	ORDER
Appellee.	)	

Before: TANG, PREGERSON and T.G. NELSON, Circuit Judges

Appellant's motion to recall the mandate is granted.

Appellant's motion for reconsideration of this court's February 2, 1995 order is granted.

The order entered February 2, 1995 is amended nunc pro tunc to that date to read as follows:

The panel has voted to deny appellant's petition for rehearing and to

reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

The mandate shall issue fourteen days from the date of this order.

APPENDIX F

[Filed June 3, 1994]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	) No. 94-15781
REINHOLD MARSONER,	) DC# MISC-93-SMM) Arizona) (Phoenix)
Witness-Appellant,	)
v.	)
UNITED STATES OF AMERICA,	) ORDER
Appellee.	)

Before: TANG, PREGERSON and T.G. NELSON, Circuit Judges

The court affirms the district court's order finding appellant in contempt of court for refusing to sign a consent directive before the grand jury as directed by the district court. See 18[sic] U.S.C. § 1826.

A published opinion of the court's decision will follow.